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IN THE

Supreme Court of the United States

October Term, 1963.

No. 56.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION and THE UNITED STATES OF AMERICA,

Petitioners,

v.

ROBERTA BARRACK, Admx., etc., et al.,
SIDNEY W. POPKIN, et al.,
HOWARD H. RAPP, Admr., etc., et al.,
LEAH BIERNBAUM, Extrx., etc., et al.,
DORIS A. LAISTER, Extrx., etc., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 56.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION, AND THE UNITED STATES OF AMERICA,

Petitioners,

v.

ROBERTA BARRACK, ADMX., ETC., ET AL.,

SIDNEY W. POPKIN, ET AL.,

HOWARD H. RAPP, ADMR., ETC., ET AL.,

LEAH BIERNBAUM, EXTRS., ETC., ET AL.,

DORIS A. LAISTER, EXTRX., ETC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of District Judge Van Dusen directing transfer of 45 civil actions from the Eastern District of Pennsylvania to the District of Massachusetts pursuant to Section 1404(a) of the Judicial Code (R. 1-20) is reported

sub nom. Popkin, et al. v. Eastern Air Lines, et al., 204 F. Supp. 426 (E. D. Pa. 1962). The opinion of Circuit Judges Staley and Forman and District Judge Lane of the United States Court of Appeals for the Third Circuit directing that the order be vacated (R. 71-77) is reported *sub nom. Barrack v. Van Dusen*, 309 F. 2d 953 (3d Cir. 1962). An order amending a portion of this opinion dated February 21, 1963, is not yet reported but is printed in the Record at pages 95-96.

JURISDICTION.

The writ of mandamus directing Judge Van Dusen to vacate and set aside the order of transfer was issued on December 14, 1962 (R. 79-81), in accordance with the Court's order entered December 7, 1962 (R. 78-79). The Petition for Writ of Certiorari (No. 56) was filed with this Court on January 11, 1963 and was granted on April 15, 1963 (R. 97). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Where 114 actions arising out of the accident here involved have been instituted in the District of Massachusetts, the accident having occurred there, that being the only district in which all requirements of venue and jurisdiction might have been met as to all defendants, and the District Court having determined that 45 wrongful death and personal injury actions instituted against four of the same defendants in Pennsylvania should be transferred to Massachusetts for the convenience of witnesses and in the interest of justice, does plaintiffs' failure, in some of these wrongful death actions, to apply for ancillary appointments as personal representatives in Massachusetts foreclose that district from being a district where these wrongful death actions "might have been brought" within the meaning of Section 1404(a) of the Judicial Code?

STATUTE INVOLVED.

Section 1404(a) of the Judicial Code, 28 U. S. C., § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

One hundred and sixty-six actions for wrongful death or personal injuries presently are pending in United States District Courts arising from the crash of a commercial aircraft shortly after take-off from International Airport in Boston on October 4, 1960. One hundred and fourteen of these suits were brought in the District of Massachusetts. Fifty-two of them were instituted in the Eastern District of Pennsylvania.[1]

This Petition involves 40 of the wrongful death and 5 of the personal injury actions which were brought by respondents in the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corporation, General Motors Corporation and the United States of America.[2] Jurisdiction is based on diversity of citizenship

1. A number of plaintiffs in both courts instituted separate suits against one or more of the defendants.

2. Seven of the present respondents also brought actions in the Eastern District of Pennsylvania in admiralty. Prior to the entry of the Order directing transfer of the present cases to Massachusetts, Judge Van Dusen directed dismissal of the admiralty actions on the ground that admiralty did not have jurisdiction over the claims arising out of the accident. *Weinstein v. Eastern Air Lines, Inc., et al.*, 203 F. Supp. 430 (E. D. Pa. 1962). On April 26, 1963, the Court of Appeals reversed. 316 F. 2d 758 (3d Cir. 1963). On July 16, 1963, a Petition for a Writ of Certiorari was filed seeking review by this Court of the reversal of Judge Van Dusen's dismissal of the admiralty actions. *Eastern Air Lines, Inc., et al. v. Weinstein, et al.*, October Term, 1963, No. 276.

and, as to the United States, on the Federal Tort Claims Act. The same parties are defendants in the actions pending in Massachusetts. In some of the Massachusetts suits, the Massachusetts Port Authority is also a defendant. Eastern, Lockheed and General Motors are subject to suit in both districts. Due to the venue provisions of the Federal Tort Claims Act and the location of the Massachusetts Port Authority, Massachusetts is the only district in which all of the actions arising from this crash may be maintained against all defendants (R. 11).

Under these circumstances, defendants filed motions to transfer these 45 actions to Massachusetts [3] in accordance with Section 1404(a) of the Judicial Code. Following extensive oral argument and careful consideration of the briefs, affidavits, and other matters submitted by the parties, Judge Van Dusen granted the motions. He found that these actions "might have been brought" in Massachusetts and concluded that transfer would be for the convenience of witnesses and in the interest of justice. Among other things, he found that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability; that consolidation of the actions pending in Pennsylvania with those in Massachusetts for purposes of proceedings before trial is likely to produce more fair and orderly trials for all litigants and to save needless time and expense to the public, including jurors, and other litigants whose cases are awaiting trial; and that consolidation of all these cases will result in the conduct of fewer trials on the issues of liability, thereby avoiding the economic waste involved in duplicating litigation and the risk of inconsistent results as to liability.

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3. The motions also sought transfer of the seven admiralty actions. Judge Van Dusen found it unnecessary to consider the motions in so far as they sought transfer of the admiralty actions, however, since he previously had held that jurisdiction did not lie in admiralty. See footnote 2, *supra*.

The plaintiffs below, the present respondents, petitioned the Court of Appeals for the Third Circuit for writs of mandamus or prohibition (R. 22-48; 51-60). The defendants, petitioners here, were permitted to intervene in the Court of Appeals in opposition (R. 65). The Court of Appeals held that Judge Van Dusen was without jurisdiction to transfer the wrongful death actions (R. 71-77) and directed him to reconsider transfer of the personal injury cases in light of this ruling (R. 77). The sole basis for this opinion was that because some of the personal representatives had not applied for ancillary letters of administration in Massachusetts, the actions might not have been brought there. The court conceded that it was "quite likely" that ancillary letters would have been granted if application had been made and recognized that all defendants were subject to suit in Massachusetts (R. 76). It held, however, that Section 1404(a) did not authorize transfer to a district where the named plaintiffs did not have an absolute right to sue under the law of the state in which the court was located without having first applied for ancillary letters of appointment (R. 74-77).[4]

In resolving this issue against transfer, the Court of Appeals relied on this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335 (1960) (R. 74-76). The District Court had resolved the issue in favor of transfer relying on this Court's later decision in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960) (R. 19-20).

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4. The transfer order was not set aside as to three wrongful death actions in which venue in the Eastern District of Pennsylvania was improper as to the United States. The Court of Appeals originally held that all three were properly transferred to Massachusetts, presumably under the provisions of Section 1406(a) of the Judicial Code (R. 77). Since this provision authorizes transfer only to a district in which the action "could have been brought" and plaintiffs in two of these cases have not applied for ancillary letters of administration in Massachusetts, the Court of Appeals withdrew its holding as to these cases after the petitions for certiorari were filed (R. 95-96).

SUMMARY OF THE ARGUMENT.

The intent of Congress in enacting Section 1404(a) was that any civil action might be transferred to districts such as Massachusetts where the requirements of venue and jurisdiction can be met. Section 1404(a) was drafted in accordance with the common law doctrine of *forum non conveniens*. That doctrine presupposed only an alternative forum in which the defendant was amenable to suit; the existence of other defenses in the alternative forum did not bar dismissal. Accordingly, in enacting Section 1404(a), Congress authorized transfer to any district in which the action "might have been brought." By the venue provisions of the Judicial Code it designated Massachusetts as a district in which these actions "may be brought" or "may be prosecuted." It follows that Congress intended that these actions "might have been brought" in that district where defendants are amenable to suit and that they may be transferred there now. In fact, numerous actions for wrongful death arising from this crash have been brought against these same defendants in Massachusetts. The use of the language "could have been brought" in Section 1406(a) of the Judicial Code and the meaning of the term "action" as applied to representative parties in the Federal Rules of Civil Procedure also support the conclusion that the capacity of the representative plaintiff is not relevant to determining whether an action may be transferred under Section 1404(a).

The decisions of this Court and of others demonstrate that Section 1404(a) has been and should be interpreted in this fashion. The construction adopted by the Court of Appeals would discriminate against defendants by giving plaintiffs an absolute right to "forum shop," contrary to this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335 (1960). It would make the method of bringing the action decisive of transfer, contrary to this Court's opinion in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960).

Nearly all courts which have interpreted Section 1404(a) have concluded that defenses in the transferee district other than those of venue and jurisdiction do not preclude transfer under Section 1404(a).

Efficient administration of the federal courts requires that ambiguity, if any, in the "might have been brought" phraseology be resolved in favor of transfer. Otherwise, district court judges will be unable to relieve the federal courts of duplicating litigation in multiple districts in cases where the availability of Section 1404(a) is most important. This interpretation need not result in prejudice to any party by reason of potential defenses in the transferee district. Numerous techniques and principles are available and have been used by district courts to insure that transfer will not become a method of defeating a party's claim.

Finally, under Massachusetts law these actions might have been brought in Massachusetts regardless of defendants' consent. Plaintiffs might have obtained ancillary appointments in Massachusetts as a matter of routine formality. In fact, plaintiffs in three of these actions did so and brought actions in both Massachusetts and Pennsylvania.

ARGUMENT.

I. The "Might Have Been Brought" Requirement Is Limited to Venue and Jurisdiction.

The reasons expressed by the district court for the transfer of these cases serves the design of Congress in enacting Section 1404(a). Its purpose was to reduce "wastefulness of time, energy and money," and to "protect litigants, witnesses and the public against unnecessary inconvenience and expense" arising from duplicating litigation in multiple districts. *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 27 (1960). Despite this, the Court of Appeals held that the transfer order was invalid. It reasoned that because the plaintiffs in the wrongful death actions had not applied for ancillary letters of administration in Massachusetts, the actions might not have been brought there.

Common sense would dictate that these actions "might have been brought" in Massachusetts because numerous other actions for wrongful death arising from this accident have been brought against these same defendants in Massachusetts (R. 2, 8-12), three of them by plaintiffs[5] who are plaintiffs in three of these wrongful death actions.[6] More

5. *Doris A. Laister, as Executrix and as Special Administratrix of the Estate of Chester H. Laister, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority and United States of America*, No. 61-766-J; *Selma Birenbaum, Abe Birenbaum and Abram P. Piwosky, as Executors and Special Administrator of the Estate of Martin Birenbaum, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority, and United States of America*, No. 61-764-J; *Sylvia Barrack, as Special Administratrix and Administratrix with the Will Annexed of the Estate of Morris Barrack, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority and United States of America*, No. 61-763-J.

6. *Doris A. Laister, as Executrix of the Estate of Chester H. Laister, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 29724; *Selma Birenbaum, Abe Birenbaum and Abram P. Piwosky, as Ex-*

importantly, the manifest intent of Congress in enacting Section 1404(a) and the decisions of this Court and of others demonstrate that the "might have been brought" requirement is limited to requirements of venue and jurisdiction. Since these requirements could have been met in Massachusetts, that district is a district in which these actions "might have been brought" within the meaning of Section 1404(a).

A. The Acts of Congress.

The historical background of Section 1404(a) demonstrates that the phrase "might have been brought" requires only that the transferee district be one in which the defendants are amenable to suit. The Reviser's Notes and the decisions of this Court[7] state that 1404(a) was drafted in accordance with the common law doctrine of *forum non conveniens*. Under this doctrine a dismissal could be entered only if there was a second forum in which the defendants were amenable to suit. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 506-507 (1947). The availability of defenses in the alternate forum other than that defendants were not subject to suit there did not inhibit the discretionary power of dismissal under the doctrine. Dismissals were upheld notwithstanding the fact that the statute of limitations might have run in the alternate forum,[8] or that under the applicable law of the alternate forum the damages recoverable might have been less than those recoverable in the forum in which suit was instituted.[9] It follows that the

ecutors of the Estate of Martin Birenbaum, Deceased v. Eastern Air Lines, Inc., Civil Action No. 30288; *Sylvia Barrack, as the widow of Morris Barrack, Deceased, and the First Pennsylvania Banking & Trust Company, as Executor of the Estate of Morris Barrack, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 30289.

7. *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955); *Ex parte Collett*, 337 U. S. 55 (1949).

8. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 516 (1947).

9. *Canada Malting Co. v. Paterson Co.*, 285 U. S. 413 (1932); *The Paula*, 91 F. 2d 1001 (2d Cir. 1937).

"might have been brought" requirement of 1404(a) should not be construed to prohibit transfer so long as the transferee district is one in which the defendant is amenable to suit.

Other provisions of the Judicial Code, enacted with Section 1404(a) as a revision of the entire Code, also indicate that Congress intended the "might have been brought" requirement to be limited to districts in which proper venue and jurisdiction existed. Section 1404(a) is contained in Part IV of Title 28, United States Code, Chapter 87, which are respectively entitled "Jurisdiction and Venue," "District Courts; Venue." And most of the sections governing venue of civil actions contained in Part IV, Chapter 87, use the phrase "may be brought" or "may be prosecuted" in defining the districts in which venue is proper.[10] As applied to these actions against the corporate defendants, Section 1391(a) designates the District of Massachusetts as a district in which these actions "may be brought" and, as to the United States, Section 1402(b) designates it as a district in which the actions "may be prosecuted." Since these actions "may be brought" or "may be prosecuted" in the District of Massachusetts, the use of similar language by Congress in Section 1404(a) compels the conclusion that it intended that these actions might be transferred there because they "might have been brought" in that district.

10. See, e.g., 28 U. S. C., § 1391(a) (diversity jurisdiction); 28 U. S. C., § 1391(b) (federal question jurisdiction); 28 U. S. C., § 1392 (defendants or property in different districts of same state); 28 U. S. C., § 1393(b) (defendants in different divisions); 28 U. S. C., § 1394 (actions against Comptroller of Currency); 28 U. S. C., § 1395 (actions for recovery of fines, penalties or forfeitures); 28 U. S. C., § 1396 (actions for recovery of internal revenue taxes); 28 U. S. C., § 1397 (interpleader); 28 U. S. C., § 1399 (partition actions); 28 U. S. C., § 1400(b) (actions for patent infringement); 28 U. S. C., § 1401 (stockholders' derivative actions); 28 U. S. C., § 1402 (United States as defendant). Other venue provisions use the language "shall be brought" or "may be instituted." 28 U. S. C., § 1398 (Interstate Commerce Commission orders); 28 U. S. C., § 1400(a) (copyright actions); 28 U. S. C., § 1403 (eminent domain).

As pointed out by the dissenting opinion of Judge Hastie in *Paramount Pictures v. Rodney*, 186 F. 2d 111, 116 (3d Cir. 1950):[11]

> "This background suggests that proper venue in more than one forum is the limiting context of the Code revision and that within this context Section 1404(a) substitutes a broad power of transfer for a more restricted pre-existing power of dismissal. Plaintiffs are prevented from abusing their normal privilege of choice among districts of proper venue. At the same time, courts are directed to respect the legislative enumeration of places which Congress has deemed appropriate for the trial of various types of litigation." (186 F. 2d 115, 118).

Section 1406(a) of the Judicial Code also supports this conclusion. That section authorizes transfer of cases from a district in which venue is improper "to any district or division in which it *could have been brought*" (emphasis supplied). But unless this requirement is limited to venue and jurisdiction, personal representatives who institute suit in a district in which they mistakenly believe venue to be proper will have the suit dismissed rather than transferred to a proper district if they have failed to qualify in that district.[12] Such a dismissal, rather than transfer, would be directly contrary to the result which Congress intended in enacting Section 1406(a). See *Goldlawr, Inc. v. Heiman*, 369 U. S. 463, 466-467 (1962). Yet, the same

11. A portion of this dissenting opinion was quoted with approval in *Hoffman v. Blaski*, 363 U. S. 335, 343 (1960).

12. The amendment made by the Court of Appeals to its opinion in these cases would indicate that such an unfortunate result would be required under Section 1406(a). In its original opinion, the Court of Appeals ruled that two of the wrongful death actions must be transferred to Massachusetts under 1406(a) since venue was improper in Pennsylvania (R. 77), although it held that transfer could not have been made under Section 1404(a). After the Petitions for Certiorari were filed, the Court of Appeals, at respondents' request, removed the inconsistency by withdrawing the Court's holding directing transfer of these two cases (R. 95-96).

construction should be given to both transfer provisions. If the action "could have been brought" in the transferee district within the meaning of Section 1406(a), it most certainly "might have been brought" there within the meaning of Section 1404(a).

The damages recoverable under the Massachusetts Wrongful Death Act are distributable to the persons designated in that statute irrespective of the identity of the personal representative plaintiff in whose name the action is brought. And under the Federal Rules of Civil Procedure, the identity of a nominal party is not an element of a "civil action." Thus Rule 25(b) provides:

> "If a party becomes incompetent, the Court upon motion served as provided in subsection (a) of this rule may allow *the action* to be continued by or against his representative." (Emphasis supplied.)

and Rule 25(c) provides:

> "In case of any transfer of interest, *the action* may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in *the action* or joined with the original party. . . ." (Emphasis supplied.)

Under Rules 13(h) and 24, additional parties may be brought in or may intervene in an "action." Since Massachusetts courts admittedly would have entertained actions for the wrongful deaths of plaintiffs' decedents, it is plain that these "civil actions" "might have been brought" in Massachusetts irrespective of whether or not they would have been enforceable in Massachusetts by the present plaintiffs, as opposed to some other fiduciary duly qualified in Massachusetts.[13]

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13. The Court of Appeals did not accept this contention, reasoning that the identity of nominal parties "is determinative of such basic matters as jurisdiction and venue" (R. 76). Admittedly, however, each of these requirements could have been met in Massachusetts.

Those plaintiffs, who are personal representatives are nominal parties who have no financial interest in the damages recoverable. Massachusetts courts would have entertained suits for the wrongful death of plaintiffs' decedents. All defendants might have been legally brought before the court in Massachusetts. In fact, all of them have been brought before that court in actions for wrongful death and personal injuries arising from the same crash. Massachusetts is a district which Congress has designated as being appropriate for this type of action. It is patent, therefore, that these actions "might have been brought" in Massachusetts.

B. Judicial Decisions.

The Court of Appeals ruled that this Court's decision in *Hoffman v. Blaski*, 363 U. S. 385 (1960) "compels the conclusion that respondent was without power to transfer these actions" (R. 75). Contrary to the decision below, *Hoffman v. Blaski* contains no justification for such a result. In fact, this Court's opinion in that case contains the strongest reason why the "might have been brought" phraseology is limited to venue and jurisdiction. In *Hoffman* this Court held that a district in which venue and jurisdiction were lacking was not a district in which the action "might have been brought" despite the defendant's waiver of its objections to these matters. The Court observed that to hold otherwise would be inequitable and discriminatory in that a defendant could obtain a transfer to a district in which the action could not have been prosecuted without defendant's consent. 363 U. S. 335 at 344.

The decision of the Court of Appeals in the present case does violence to reasoning of this Court in *Hoffman v. Blaski* by granting to those interested in enforcing a claim for wrongful death an absolute right to "forum shop." At the same time, the defendant is limited to the one district which the plaintiffs have selected. This right to "forum shop" may be exercised by having an appropriate person

appointed only in the district selected and by having him bring suit there. Ordinarily there are other districts in which the defendant is subject to suit, in which the wrongful death claim might be enforced, and in which the convenience of parties and witnesses and the interest of justice may require that the action be tried. However, under the ruling of the Court of Appeals, the defendant could not have the action transferred to any of them because the nominal plaintiff thus selected had not applied for an appointment in the transferee district. Since Section 1404(a) was not designed "to provide a shelter for *in rem* admiralty actions in costly and inconvenient forums," *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 27 (1960), the ruling by the Court of Appeals that a shelter may be found in state fiduciary law is totally unjustified.

The ruling of the Court of Appeals squarely conflicts with this Court's opinion in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960). In that case the libellant attempted to avoid transfer by bringing suit both *in rem* against the barge and *in personam* against the barge owner. This Court held that the action "might have been brought" in the transferee district, notwithstanding the fact that plaintiff would have been unable to commence suit *in rem* against the vessel in the transferee district.

This Court reasoned that the claim against the barge was merely an alternate method of bringing the real defendant, the barge owner, into court. Since the barge owner was subject to suit in the transferee district and the substance of what had to be done to adjudicate the rights of the parties in both claims was identical, the actions "might have been brought" in the transferee district. The Court said:

> "The idea behind 1404(a) is that where a 'civil action' to vindicate a wrong—*however brought in a court*—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole

action to the more convenient court." 364 U. S. 19, 26. (Emphasis supplied.)

Similarly, those interested in enforcing these wrongful death claims could have brought defendants into court by naming as party-plaintiff a personal representative qualified under the laws of Massachusetts. Their choice of a Pennsylvania rather than a Massachusetts personal representative should not bar transfer now, particularly since the cases present issues and require witnesses which make the District of Massachusetts much more convenient than the Eastern District of Pennsylvania.

Nearly all of the courts which have interpreted Section 1404(a) have concluded that the existence of potential defenses in the transferee district, other than those of venue and jurisdiction, do not bar transfer.[14] Transfers have been ordered even though the court of the transferee district, unlike the court of the district chosen by plaintiff, would probably rule that plaintiff had no cause of action;[15] even though plaintiff contended that the damages recoverable in the transferee forum would be less than those recoverable in the transferor forum;[16] and even though the actions would have been barred by the statute of limitations applicable in the transferee district.[17] These decisions do not result

14. To the extent that the decision of *R. F. Felchlin v. The American Smelting and Refining Company*, 136 F. Supp. 577 (S. D. Cal. 1955), holds to the contrary, petitioners submit that the case was wrongly decided. It is distinguishable in that under the law of Texas, the transferee forum in that case, a suit brought by a foreign personal representative is a nullity and the complaint cannot be amended to show that the plaintiff later obtained ancillary letters of administration. *Pirkle v. Cassity*, 104 F. Supp. 318 (E. D. Tex. 1952). The law of Massachusetts does permit such an amendment. See pages 22 and 23, *infra*.

15. *Ackert v. Van Pelt Bryan*, 299 F. 2d 65 (2d Cir. 1962); *Clayton v. Warlick*, 232 F. 2d 699 (4th Cir. 1956).

16. *Goranson v. Kloeb*, 308 F. 2d 655 (6th Cir. 1962).

17. *H. L. Green Co. v. McMahon*, 312 F. 2d 650 (2d Cir. 1962); *Headrick v. Atchison, T. & S. F. R.*, 182 F. 2d 305 (10th Cir. 1950); *Gomez v. The S. S. Dorothy*, 183 F. Supp. 499 (D. Puerto Rico, 1959); *Crawford v. The S. S. Shirley Lykes*, 148 F.

in prejudicing the legitimate interests of the parties. The courts ordering transfer have, in the exercise of their discretion, utilized techniques and legal principles which permit transfer but prevent it from becoming a method of defeating a party's claim. See pages 20 and 21, *infra*.

II. Efficient Administration of the Federal Courts Compels the Conclusion That These Actions Might Have Been Brought in Massachusetts.

If any ambiguity exists in the "might have been brought" phraseology, it most certainly should be resolved in favor of the Congressional purpose of reducing the wastefulness of time, energy and money involved in duplicating litigation in the federal courts. The Court of Appeals did precisely the contrary. It recognized that its ruling would curtail the application of Section 1404(a) (R. 76-77). However, it said it could not presume that Congress intended to alter state policy by permitting transfer of representative suits to courts in states which do not permit a personal representative to bring suit by virtue of his foreign appointment (R. 76-77).

This Court consistently has rejected such restrictive constructions of transfer statutes based upon legal principles which are irrelevant or inapplicable to the procedural reforms desired by Congress. In *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960), for example,[18] this Court followed the "common-sense approach" in interpreting Section 1404(a) since "failure to do so would prac-

Supp. 958 (S. D. N. Y. 1957); *Curry v. States Marine Corp. of Delaware*, 118 F. Supp. 234 (S. D. N. Y. 1954); *Frechoux v. Lykes Bros. S. S. Co.*, 118 F. Supp. 234 (S. D. N. Y. 1953); *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410 (D. N. M. 1949).

18. In *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955), this Court refused to limit the discretion of district judges by application of the standards existing under the doctrine of *forum non conveniens*. In *Goldlawr, Inc. v. Heiman* 369 U. S. 463 (1962), this Court held that traditional conceptions of personal jurisdiction in the transferor court were irrelevant to the Congressional purpose of permitting transfer to a district in which venue and jurisdiction were present.

tically scuttle the *forum non conveniens* statute so far as admiralty actions are concerned." 364 U. S. 19 at 26.

There is even greater reason for the same common-sense approach in interpreting Section 1404(a) in these cases. The ruling of the Court of Appeals would nullify the statute in nearly every case in which a fiduciary is a party. It also would needlessly burden the courts with duplicating litigation in the types of cases in which the provisions of Section 1404(a) are most needed.

The provisions of Section 1404(a) are particularly important to the administration of the federal courts in wrongful death and related litigation arising from disasters such as mass-transportation accidents and explosions. In this type of litigation, of which the cases at bar are excellent examples, the facts determinative of liability in all claims must be established by substantially the same witnesses, even though some of the claims may be for death, others for personal injury and still others for property loss. In such cases, vast economies can be effected in judicial time and effort as well as in that of numerous members of the public serving as witnesses, jurors and advisors to the litigants by consolidating the cases in one district for pretrial procedures and for the trial of liability issues.

Under the ruling of the Court of Appeals, potential transferee districts are limited to those few jurisdictions located in the seven states which permit a foreign fiduciary to obtain judgment in wrongful death actions by virtue of his foreign appointment.[19] Of the remaining forty-four of the fifty-one jurisdictions, twenty-three require the for-

19. Arizona, Ariz. Rev. Stat. Ann. § 12-612 (1956); Delaware, Del. Code Ann. tit. 12, § 1561 (1953); Iowa, *Gross v. Hocker*, 243 *Iowa* 291, 51 N. W. 2d 466 (1952); Michigan, *Siverling v. Lee*, 90 F. Supp. 659 (D. C. Mich. 1950); *Cardor v. Marhoff*, 143 F. Supp. 920 (D. C. Mich. 1956); Missouri, *Demottei v. Missouri-Kan. Tex. R. R.*, 345 Mo. 1136, 139 S. W. 2d 504 (1940); New Mexico, *Henkel v. Hood*, 49 N. M. 45, 156 P. 2d 790 (1945); Wisconsin, *Robertson v. Chicago, St. P. M. & O. R. R.*, 122 Wisc. 66, 99 N. W. 1135 (1904).

eign fiduciary to obtain ancillary appointment in connection with suits under the state's wrongful death act,[20] nineteen require other affirmative preliminary acts, such as filing of foreign letters, appointing a resident agent for service of process and filing bond[21] and two do not permit

20. Alaska, Alaska Comp. Laws Ann. § 61-3-2 (Supp. 1958); California, Cal. Civ. Prac. Code § 1913; Prob. Code §§ 360, 362, 400, 405, 407, 420 (1956); Connecticut, Conn. Gen. Stat. Ann. § 52-21; § 45-208 (1960); Hawaii, Hawaii Rev. Laws § 317-9 (1955); Idaho, Idaho Code Ann. § 15-220, 222, 317 (1948); Kentucky, Ky. Rev. Stat. § 394.150, § 395.005 (1955); Maine, Me. Rev. Stat. Ann. Ch. 154, §§ 14, 15, 17, 62 (1954); Maryland, Md. Ann. Code art. 93, §§ 45, 57, 368 (1957); Massachusetts, Mass. Gen. Laws Ann. ch. 191, § 5; ch. 192, §§ 4, 5, 9, 11 (1955); Montana, Mont. Rev. Code Ann. § 91-1001 (Supp. 1961); § 91-1002, 1301, 1302, 1405 (1949); Nevada, Nev. Rev. Stat. § 136.260, § 138.020, § 139.010 (1961); North Carolina, N. C. Gen. Stat. § 28-8 (1950); § 28-186 (Supp. 1961); § 31-23, 27 (1950); Oregon, Ore. Rev. Stat. § 115.160, 190, 410 (1961); Rhode Island, R. I. Gen. Laws Ann. § 33-7-18, 21; § 33-8-7; § 33-18-9 (1957); South Carolina, S. C. Code § 19-281 (1952); § 19-591 (Supp. 1962); Tennessee, Tenn. Code Ann. § 30-105, 106; 32-501 (1955); 35-610 (Supp. 1960); Texas, Tex. Prob. Code §§ 78, 95, 105 (1956); Utah, Utah Code Ann. § 75-3-22, 23, 24; 75-3-15; 75-4-4 (1953); Vermont, Vt. Stat. tit. 4, ch. 313; tit. 14, ch. 902 (1958); tit. 14, ch. 904 (Supp. 1961); Virginia, Va. Code Ann. § 26-59 (Supp. 1960); § 64-88 (1949); Washington, Wash. Rev. Code § 11.20.090, § 11.28.010; § 11.36.010 (1951); West Virginia, W. Va. Code ch. 41, art. 5, § 4073; ch. 44, art. 5, § 4207 (1961); Wyoming, Wyo. Stat. Ann. § 2-52, 68, 95, 106 (1959).

21. Alabama, Ala. Code tit. 61, § 151 (1960); Arkansas, Ark. Stat. § 27-805 (repl. vol. 1962); District of Columbia, D. C. Code Ann. § 20-504, 505 (1961); Florida, Fla. Stat. § 734.30 (Supp. 1961); Georgia, Ga. Code § 113-2401, 2402, 2403, 2405 (1933); Illinois, Ill. Rev. Stat. ch. 3, § 265.416 (1961); Indiana, Ind. Ann. Stat. § 7-752 (repl. vol. 1953); Kansas, Kan. Gen. Stat. Ann. § 59-1707, 1708 (1949); Minnesota, Minn. Stat. § 573.05 (1947); Mississippi, Miss. Code Ann. § 622 (1957); Nebraska, Neb. Rev. Stat. § 30-303, 807 (1956); New Hampshire, N. H. Rev. Stat. Ann. § 553:14 (1955); *Ghilgin v. Couture*, 84 N. H. 48, 146 Atl. 395 (1929); New Jersey, N. J. Rev. Stat. § 3A:12-7 (1953); New York, N. Y. Surr. Ct. Act. §§ 159, 167 (1953), § 160 (Supp. 1961); North Dakota, N. D. Rev. Code § 30-11-03, 19; § 30-24-18 (1960); Ohio, Ohio Rev. Code Ann. § 2109.04; § 2113.75 (1954); Oklahoma, Okla. Stat. tit. 58, § 262, § 171-88 (1937); Pennsylvania, Pa. Stat. tit. 20, § 320.1101 (Supp. 1961); South Dakota, S. D. Code § 35.0902 (Supp. 1960).

suit in the name of the fiduciary.[22] Of the same fifty-one jurisdictions, only one permits the foreign fiduciary to obtain a judgment by virtue of his foreign appointment in actions other than for wrongful death,[23] thirty require the foreign fiduciary to obtain ancillary appointment,[24] and twenty require other affirmative preliminary acts such as filing of foreign letters, appointing a resident agent for service of process and filing bond.[25] Thus the extent to which Section 1404(a) would be circumscribed by the ruling of the court below is readily apparent.

The practical effect of the ruling is not limited to death claims in the usual context of disaster litigation. Although the ruling raises no bar to the transfer of other claims, the advantages to be derived from their consolidation with other suits pending in the transferee district will no longer be available since the death cases must in any event remain in the inconvenient transferor district. Thus in the present cases, for example, the Court of Appeals has urged the District Court to reconsider its order transfer-

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22. Colorado, Col. Rev. Stat. Ann. § 41-1-1, 2 (1953); Louisiana, La. Civ. Code Ann. art. 2315 (West Supp. 1961).

23. Delaware, Del. Code Ann. tit. 12, § 1561 (1953).

24. In addition to those jurisdictions referred to in footnote 20, *supra*, the following States require the foreign fiduciary to obtain ancillary appointment in actions other than for wrongful death: Arizona, Ariz. Rev. Stat. Ann. § 14-341, 342 (1956); Iowa, Iowa Code § 633.33, 34, 45, 50 (1950); Louisiana, La. Code Civ. Proc. Ann. arts. 3081, 3097 (West 1961); La. Civ. Code Ann. art. 1596 (West 1952); La. Rev. Stat. Ann. § 9:2401, 2421, 2422, 2423 (1951); Michigan, Mich. Stat. Ann. § 27.3178 (98), (100), (278) (1943); Missouri, Mo. Rev. Stat. § 473.117, 667; § 474.380 (1956); New Hampshire, N. H. Rev. Stat. Ann. § 551:5; § 553:5; § 554:28 (1955); New Mexico, N. M. Stat. Ann. § 31-1-4, 5, 6; § 31-2-1. (1954).

25. The jurisdictions requiring other affirmative preliminary acts in actions other than for wrongful death are the same as those referred to in footnote 21, *supra*, with the following changes: add, Colorado, Col. Rev. Stat. Ann. § 152-6-7, 8 (1953) and Wisconsin, Wisc. Stat. § 287.16 (1958); delete, New Hampshire.

ring the personal injury claims, in view of the Court's ruling with respect to the death cases (R. 77).

The increased cost of litigation which the court's ruling will create will be borne not only by large corporations, but by individuals as well, such as those involved in accidents of automobiles or private aircraft. It will also be borne by the United States, which, under the Federal Tort Claims Act, may be sued in any state in which the plaintiff resides. The savings to be effected by consolidating duplicating litigation in one district is particularly important to the United States as a litigant. Perhaps of greatest public importance will be the inability of district judges, as a result of the Court's ruling, to utilize Section 1404(a) to alleviate the burdens on the federal judicial system which duplicating litigation needlessly imposes.

Construing 1404(a) to meet the needs of the administration of the federal courts need not result in prejudice to any party by reason of potential defenses in the transferee district. Numerous techniques and principles, other than barring transfer as a matter of law, are available and have been used by district courts to prevent transfer from becoming a method of defeating a party's claim. In *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 27 (1960), the libellant's interest in the *in rem* action was protected by the owner's promise to pay any final decree which might be rendered against the barge.[26] In the cases at bar, the district court ruled that defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions (R. 20). This principle has been used by other district courts.[27] Where the action might be barred

26. In *Torres v. Walsh*, 221 F. 2d 319 (2d Cir. 1955), *cert. denied*, 350 U. S. 836, the filing of such a stipulation was made an express condition of transfer to a district where *in rem* jurisdiction could not have been acquired.

27. See, e.g., *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410, 414 (D. N. M. 1949).

by the statute of limitations in the transferee district, some courts have ordered transfer on the condition that defendant agree to waive this defense.[28] Still others have met the problem by ruling that under Section 1404(a) the transferee district must apply the same law in the trial of the case as would have been applied if the case had been tried in the district in which the case was originally instituted.[29]

These considerations compel the conclusion that the "might have been brought" requirement should be interpreted to be limited to the requirements of venue and jurisdiction. This interpretation preserves the plaintiff's choice among districts of proper venue, but prevents abuse of that choice. It will enable district judges to relieve the federal courts of unnecessary duplication of litigation. At the same time, it will permit district judges, in their discretion, to insure that transfer is not being used to defeat a party's claim.

III. These Actions Might Have Been Brought in Massachusetts by These Plaintiffs Irrespective of Defendants' Consent.

These plaintiffs might have brought the present actions in Massachusetts whether or not defendants had raised objections to their capacity to bring them. Plaintiffs would only have had to obtain ancillary appointments by the presentation of a petition for administration in the county in which the decedents' deaths occurred in compliance with routine formalities.[30] The Court of Appeals acknowledged that "it is quite likely" that such appoint-

28. *Hokanson v. Helene Curtis Industries, Inc.*, 177 F. Supp. 701 (S. D. N. Y. 1959); *May v. The Steel Navigator*, 152 F. Supp. 254 (D. C. N. Y. 1957); *Crawford v. The S. S. Shirley Lykes*, 148 F. Supp. 958 (D. C. N. Y. 1957).

29. *H. L. Green Co., Inc. v. McMahon*, 312 F. 2d 650 (2d Cir. 1962); *Headrick v. Atchison, T. & S. F. Ry.*, 182 F. 2d 305 (10th Cir. 1950).

30. Mass. Gen. Laws Ann., Chapters 193, 194 and 195, § 8.

ments could have been obtained (R. 76). In fact, this is a virtual certainty. Plaintiffs in three of these death actions instituted in Pennsylvania, who are citizens of Pennsylvania with Pennsylvania domiciliary appointments, actually did obtain ancillary appointments in Massachusetts. They brought suits in that district against three of the defendants, having brought suit against the fourth, Eastern Air Lines, Inc., in the Eastern District of Pennsylvania.[31]

Their capacity to bring the actions could not be successfully attacked even if the ancillary appointments were obtained after their suits were instituted. In *Boudreau v. New England Transportation Company*, 315 Mass. 423, 53 N. E. 2d 92 (1944), plaintiff, a Rhode Island administratrix, commenced a timely suit in Massachusetts under the Massachusetts Wrongful Death Act. After the statute of limitations had expired, plaintiff was allowed to amend her writ to show her appointment as an ancillary administratrix in Massachusetts. Defendant appealed on the ground that no amendment could be made because the original writ was a nullity, having been instituted by a person having no capacity. The court held, however, that the amendment was properly made for the following reasons:[32]

> ". . . This is not a case where there was no plaintiff in existence when the action was brought. The plaintiff was a live person in whatever capacity she was acting or purporting to act. The question was

31. See footnotes 5 and 6, at pp. 8 and 9, *supra*.

32. The court also held that plaintiff, having a Rhode Island appointment, was conclusively presumed to have capacity to bring the action in Massachusetts because the defendant failed to plead this defense in compliance with Chapter 231, Section 30, *Mass. Gen. Laws Ann.* Plaintiffs seek to avoid the holding of *Boudreau* by pointing out that Chapter 231, Section 30, *Mass. Gen. Laws Ann.* has been amended so that the objection to a lack of capacity might be made at any time. This is irrelevant to plaintiffs' right to bring these actions because the complaint could be amended at any time the objection is raised.

whether she had the capacity to maintain the action. She could assert that she had and could bring the action and try the issue of her competency to maintain it. *The action was therefore not a mere nullity but was from the first a genuine lawsuit and an adequate basis for an amendment alleging an appointment in the State of the forum when such appointment was secured.* (Emphasis supplied.)

Under Massachusetts law, therefore, it is clear that these plaintiffs could have brought these actions against defendants in the District of Massachusetts whether or not defendants chose to raise or waive their objections to plaintiffs' capacity.

In any event, plaintiffs' self-imposed lack of capacity to maintain suit in Massachusetts should not bar transfer now. If plaintiffs lack capacity to sue in Massachusetts, they are equally without capacity in Pennsylvania. Pennsylvania law requires that suit be brought by a person duly qualified under Massachusetts law.[33] They cannot now claim that their lack of capacity bars transfer to Massachusetts when the same defect would prevent maintenance of these suits in Pennsylvania.

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33. Rule 2207 of the Pennsylvania Rules of Civil Procedure provides as follows:

> "When an action to recover damages for wrongful death is brought in this Commonwealth to enforce rights arising under the laws of some other jurisdiction it shall be brought by the person authorized to bring the action by the law of the jurisdiction where the cause of action arose."

The Massachusetts courts have ruled that under its wrongful death statute suit may be brought only by a personal representative duly qualified in Massachusetts. *Boutilier v. Wesinger*, 322 Mass. 495, 78 N. E. 2d 195 (1948); *Brown v. Boston & Maine Railroad*, 283 Mass. 192, 186 N. E. 59 (1933). Rule 2207 requires appointment in the jurisdiction in which the cause of action arose even if the plaintiff was duly qualified in Pennsylvania. *Brennan v. Rooney*, 139 F. Supp. 484 (E. D. Pa. 1956).

CONCLUSION.

The need for reversal of the decision of the Court of Appeals is compelling. The decision of the District Court in transferring these cases to Massachusetts would serve the design of Congress in enacting Section 1404(a) by eliminating unnecessary waste of time, energy and money which the ruling of the Court of Appeals will require. Congress has designated the district of Massachusetts as a district in which this litigation "may be brought." It has authorized transfer if the action "might have been brought" there. In fact, numerous actions arising from the same crash have been brought there against these defendants. To say that the actions may not be transferred to Massachusetts because they might not have been brought there contradicts common sense, the manifest intent of Congress and the applicable decisions of this Court. The decision below is erroneous and should be reversed.

Respectfully submitted,

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